Filed 12/22/08 Moore v. Lerner CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

IVAN RENE MOORE, Plaintiff and Appellant, v. LEONARD LERNER, as Trustee, etc., et al., Defendants and Respondents.	B193358 (Los Angeles County Super. Ct. No. BC297994)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Reversed.

Ivan Rene Moore, in pro. per., for Plaintiff and Appellant.

Lerner & Weiss, Leonard D. Lerner and Jacob Kalinski for Defendants and Respondents.

Plaintiff, Ivan Rene Moore, appeals from the judgment dismissing his action, for breach of contract and related torts, against Leonard Lerner and Albert Brenhendler, trustees of an inter vivos trust (respondents), as well as Lerner's law firm, and other persons who are not parties to this appeal. Plaintiff contends that the dismissal was grounded in erroneous prior rulings, particularly one setting aside plaintiff's voluntary dismissal of the action without prejudice. We conclude that the court's in limine rulings, amounting to an issue sanction, were erroneous, and because the judgment of dismissal derived from them, it must be reversed.

FACTS

Plaintiff's fourth amended complaint alleged that in 2002 respondents, owners of commercial property on Pico Boulevard of which respondent had been a tenant, entered into a written agreement, which granted plaintiff a right of first refusal to purchase the property should it be about to be sold.[1] Plaintiff further alleged that respondents breached the contract in 2003, by selling the property to other defendants without giving plaintiff any notice, permitting him to exercise his right to preempt. In addition to breach of contract, plaintiff asserted claims for negligence, misrepresentation, interference, conspiracy, and also quiet title, the last of which was separately dismissed.

At a status conference held while the case was trailing for trial, the court, at plaintiff's suggestion, resolved to try the breach of contract cause of action first, other than with respect to damages, it being understood that only if plaintiff succeeded on that claim would the case proceed further.

Pretrial proceedings then turned to the issue of plaintiff's financial ability to perform the contract, which respondents asserted would have required a payment of

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[1] The agreement was a handwritten stipulation for judgment in an unlawful detainer proceeding against plaintiff, the only copy of which before us is largely illegible.

$1 million.[2] The court sustained respondents' motion in limine, excluding any evidence of such ability. The motion and ruling were based on plaintiff's having produced at his deposition – which had been compelled after the discovery cut-off date – only one document of this nature: a substantially obliterated $900,000 check, which the court ruled inadmissible for lack of foundation.

After further argument, the court agreed to conduct an Evidence Code section 402 hearing with respect to four witnesses who plaintiff urged could have funded the purchase for him. The following day, however, the court excluded three of the witnesses because plaintiff had not brought any documentary evidence relating to them. The fourth witness, plaintiff's domestic partner and an owner of several parcels of real estate, testified that she had been interested in purchasing the subject property during the relevant time period, and that she could have used funds from her other properties to do so. However, the court sustained respondents' speculation and lack of foundation objections to questions whether she would have done so, and whether she was ready, willing, and able to do so.

On cross-examination, plaintiff's partner testified that in 2002 she had an oral agreement with plaintiff to lend him money and do the best she could to help him to purchase the property. She had already identified an apparently mutual power of attorney with plaintiff that would have permitted him to deal in her properties. The court, however, ruled that this instrument could not be admitted at trial, because plaintiff had not disclosed it at his deposition or included it in his trial exhibit list. Therefore, the court told plaintiff, "You can't demonstrate to th[e] jury that you had the ability to buy the property." The court then inquired, "how do we end this?"

Plaintiff would not agree to respondents' suggestion for a stipulation to judgment based on the court's ruling, without prejudice to appellate review. Plaintiff suggested

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[2] This was the price respondents' buyer had paid for the property, including three adjacent parcels. Plaintiff contended that his contract contemplated only the one parcel on which he was operating, and hence the corresponding price would have been lower.

that the correct approach would be to empanel a jury and grant a nonsuit after his opening statement, but the court was reluctant so to waste juror time. Plaintiff then announced that he would dismiss the case voluntarily, without prejudice, under Code of Civil Procedure section 581, subdivision (b)(1). (Undesignated section references are to that code.) Respondents' counsel replied, "I believe there is some case law that pertains to making such motions in the face of adverse – dispositive adverse rulings . . . ." The court recessed for the noon hour, stating that it would attempt to obtain a jury panel.

During the recess, plaintiff filed a request for dismissal without prejudice. When court reconvened, the court accepted the request and dismissed the case accordingly, retaining jurisdiction for purposes of costs. Respondents stated that they would proceed with respect to permissibility of such a dismissal in these circumstances.

Two days later, respondents filed a motion for reconsideration of the dismissal, under section 1008. The motion cited numerous cases that had disallowed voluntary dismissals taken after a dispositive adjudication of the case either had been rendered or was imminent. (E.g., *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781; *Miller v. Marina Mercy Hospital* (1984) 157 Cal.App.3d 765; see *Zapanta v. Universal Care, Inc.* (2003) 107 Cal.App.4th 1167.) With respect to section 1008, subdivision (a)'s requirement that a reconsideration motion be based on "new or different . . . law," respondents averred that the cited law "was unknown and unavailable to [respondents] when plaintiff's request for voluntary dismissal was presented . . . ."[3]

The court deferred the motion for a week, to May 26, 2006, to permit opposition. At the hearing, the court agreed with respondents, and vacated the dismissal. In response to plaintiff's argument that respondents had not met the requirements of section 1008 regarding new circumstances, the court stated that when it accepted plaintiff's dismissal, it had not had a chance to review the law respondents later cited. The court then

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3 Respondents also represented that the court had denied their request to defer ruling on the dismissal until they had an opportunity to research the matter. According to the record, this representation was incorrect and untrue.

observed that the case had been pending almost three years, and "it's time to bring this to an end." The court reset the trial for June 12, 2006.

The matter was trailed and ultimately set for June 20, 2006. On that date appellant did not appear. Respondents asked for dismissal for that reason. The court observed that the statute permitting dismissal for failure to appear for trial, section 581, subdivision (b)(5), allowed such dismissal only without prejudice. The court then suggested that it might be empowered, by section 581, subdivision (m),[4] to dismiss the case with prejudice, because "previously this court has made evidentiary rulings which . . . preclude the plaintiff from going forward with his case on the basis that he cannot prove any damages." After further colloquy, respondents asked "the court dismiss the plaintiff's case with prejudice by reason of the nonsuit motion that would have been made had the jury been convened as the plaintiff requested and that he is not here to what I believe to be intentionally." The court then dismissed the action with prejudice, "under 581(M) of the Code of Civil Procedure."

On June 30, 2006, plaintiff noticed a motion for reconsideration, on grounds he had not received the telephonic notice of the June 20 trial date. In a declaration, he stated that he might not have been given the message by one of several family members who had been at his home for a funeral on June 21, or that the message "was lost on my answering machine." The court denied the motion.

DISCUSSION

Although appellant raises several contentions for reversal, we need address only one, which is dispositive. We conclude that the grant of respondents' motion in limine, and the accompanying exclusion of witnesses plaintiff adduced, were erroneous, and because the dismissal with prejudice was granted because of those rulings, it must be reversed.

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[4] Section 581, subdivision (m) provides that "The provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint as to a defendant."

Respondents' notice of plaintiff's deposition, originally set for the end of February 2006 (less than two months before trial), included a notice to produce "All writings which evidence your ability at any time between February 1, 2003, and March 30, 2003 to pay $1 million in cash to purchase the property . . . ." The notice also included 36 other categories of documents, reflecting various conceivable sources of plaintiff's wealth over the preceding four years. After first failing to appear, plaintiff was ordered to appear for deposition and produce the requested documents. At the deposition, plaintiff stated that there existed documents in the quoted category, but he could not find them. As for the other categories, he generally had no documents. He did produce the check previously referred to.

Based on these events, respondents filed a motion in limine, seeking "an order excluding all evidence of plaintiff's financial ability to purchase 5855 West Pico Boulevard at any time at trial in the above matter." Apart from the deficiencies of the check, respondents' justification for this sweeping order was as a discovery, evidence sanction, under section 2023.030, subdivision (c). To this end, respondents argued that "Certainly if plaintiff attempts to proffer at trial documents which he stated under penalty of perjury did not exist or were not found just a few days before trial, this would be a manifest abuse of the discovery process." The trial court granted the motion, effectively imposing not an evidence sanction but an issue sanction, prohibiting plaintiff from supported a designated claim (§ 2023.030, subd. (b)).

For several reasons, this dispositive ruling was improper. First, the exclusion of "all evidence" of plaintiff's ability to pay was unjustified by plaintiff's deposition responses, which concerned only documentary evidence. Second, even the exclusion of documentary evidence was uncalled for. Plaintiff had not engaged in any of the "misuses of the discovery process" listed in section 2023.010. If he belatedly found evidence that in good faith he had not produced on deposition, the more appropriate remedy would be a continuance, not exclusion. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 654.) Nor would Evidence Code section 352 have been a proper basis for excluding such evidence, as respondents assert. (*Kelly, supra,* 49 Cal.App.4th at pp. 674-675.)

The court's subsequent rulings excluding the witnesses plaintiff proffered on the same issue also were not well-grounded. The court excluded three such witnesses because plaintiff hadn't brought any documents relating to them. But once more, the presence or absence of documents does not determine the capacity of a witness or the admissibility of testimony. The fourth witness was plaintiff's partner, who did present a prima facie showing of plaintiff's ability to purchase. The court's exclusion of her testimony, because plaintiff's power of attorney from her had not been disclosed at plaintiff's deposition and was not on the exhibit list, was neither an appropriate or valid discovery sanction nor a suitable exercise of evidentiary discretion.

The record is clear that the foregoing errors contributed and indeed were indispensable to the dismissal from which plaintiff appeals. The trial court recognized that a dismissal with prejudice could not, statutorily, be rendered solely for plaintiff's failure to appear for trial. Instead, the court invoked its inherent power, as recognized by section 581, subdivision (m), and dismissed with prejudice, not simply because of plaintiff's nonappearance, but in view of his inability to proceed in the face of the court's previous in limine rulings.

Because the judgment dismissing this case was based on erroneous in limine rulings, it must reversed.

DISPOSITION

The judgment is reversed. Plaintiff shall recover costs.

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COOPER, P. J.

I concur:

FLIER, J.

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BIGELOW, J., Dissenting:

I respectfully dissent.

The matter challenged on appeal is a dismissal and the case was dismissed because plaintiff did not appear for trial. The majority has decided that was improper. Since plaintiff did not appear for trial, I would allow the dismissal to stand, with directions to the trial court to modify its decision to reflect that the dismissal is without prejudice. (Code Civ. Proc., § 581, subd., (b)(5).)

Here is what happened: on the day of trial, plaintiff was no where to be found. The case was called for trial and the court stated, "I have Mr. Schlom for the defendant. Mr. Moore was given notice last week that this matter was trailing. He was called either shortly before or shortly after the defense was called advising them that we were to commence this trial today at 1:30 p.m. . . . [¶] It is now 2:05 [p.m.]. We have a jury waiting outside. Mr. Moore has not made an appearance today at any time. . . ." Shortly thereafter defense counsel requested a dismissal; it was granted.

The trial court's dismissal order provides: "The cause is called for Trial [on June 20, 2006]. [¶] There is no appearance or phone call on plaintiff's behalf. [¶] Defendant's counsel informs the Court of his unsuccessful attempts to reach plaintiff. [¶] The Court addresses defendant, as reflected in the court reporter's notes. [¶] The Court takes judicial notice of the time, that plaintiff was given telephonic notice (on 6/19/06) to appear for trial this date, and that there has been no contact with plaintiff. [¶] Defendant's Motion to Dismiss the action with prejudice is granted. [¶] The entire action is therefore DISMISSED this date pursuant to C.C.P. section 581(m)."

Plaintiff then moved for reconsideration of the dismissal on the grounds he never received telephonic notice, was ill and had to attend a funeral. In support of his motion, plaintiff submitted a form showing he left the hospital against his doctor's advice on June 16, 2006, four days before trial, and a funeral program listing him as an honorary pallbearer on June 21, 2006, the day after trial. Although he was advised the case was

trailing and he agreed to be on telephonic notice, plaintiff stated, "The only things I think could have happen[ed is] that one of my family members from out of town could have took the message and not given it to me, or it was lost on my answering machine." The court implicitly disbelieved plaintiff, deemed his excuses insufficient grounds to reconsider the dismissal and denied the motion.

Code of Civil Procedure, section 581, subdivision (b)(5) provides a trial court with discretion to dismiss without prejudice "when either party fails to appear on the trial and the other party appears and asks for the dismissal." We review the trial court's decision to dismiss under section 581 for abuse of discretion. (*Schlothan v. Rusalem* (1953) 41 Cal.2d 414, 415.) This case falls squarely within the purview of section 581, subdivision (b)(5) and I see no abuse of discretion in the trial court's decision to dismiss this case, albeit without prejudice, under the circumstances. While California law favors trying cases on their merits, this policy does not override the equally compelling policy of expediting the administration of justice by requiring litigants to prosecute their actions with promptness and diligence. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 332.) Here, no satisfactory explanation was shown which would excuse plaintiff's failure to appear at trial. Plaintiff agreed to allow the matter to trail and be notified telephonically regarding his trial date. Indeed, he claims he had been "waiting for the call from this court regarding [the] trial" and "called the clerk several times." Plaintiff provides no indication he was still sick after he left the hospital four days before trial or that he was unable to take the phone call on June 19, 2006, alerting him to the trial date. That he was an honorary pallbearer at his cousin's funeral the day after trial started does not excuse him from appearing at trial.

Because the trial court could properly dismiss the case without prejudice under Code of Civil Procedure, section 581, subdivision (b)(5), I do not believe it is appropriate to reach Plaintiff's challenges to the judgment. Any error related to the court's rulings on the motions in limine or the earlier voluntary dismissal was harmless in light of Plaintiff's failure to appear.

It is true that the trial court discussed with defense counsel whether the dismissal should be without prejudice under section 581, subdivision (b)(5) or with prejudice pursuant to subdivision (m). Further, that the court said *had trial proceeded*, "unless [it] heard something new today that [it] was prepared to issue the 581 motion for nonsuit on the basis that the plaintiff could not go forward with their case." But that decision was never made because plaintiff never appeared for trial. By its own comments, the court explicitly left open the possibility it would not have granted the nonsuit motion had it "heard something new."

In sum, I see no abuse of discretion in the trial court's decision to dismiss the case based on the plaintiff's failure to appear at trial. The trial court's reference to section 581, subdivision (m) in its dismissal should be viewed as relying on the wrong reason to reach the right result. This principle of appellate review is basic, sound, and firmly established: we are bound to uphold the trial court's ruling if it was correct on any basis, even if given for a wrong reason. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252.)

BIGELOW, J.